

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 09 019 53245

APR 16 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner claims to be employed as a market research analyst, but the petition rests on her training in educational psychology. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, two articles, and two new witness letters.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on October 27, 2008. On the Form I-140 petition, the petitioner stated her occupation as “Market Research Analyst.” Other materials in the record identified her employer as [REDACTED], Fremont, California

In a statement submitted with the initial filing of the petition, counsel stated:

[The petitioner] is a professional educational psychologist whose work, education, and experience are primarily focused in the areas of education, psychology, with a prospective future in the area of psychometrics. . . .

Psychometrics is the field of study concerned with the theory and technique of educational and psychological measurement. It is primarily concerned with the study of measurement instruments such as questionnaires and tests. Psychometricians create the standardized tests by which our nation relies on [*sic*] to ensure a consistent and progressive educational system in grade school. . . .

In the instant matter, Beneficiary is a well-respected educational psychologist bearing degrees ranging from a prestigious university in Taiwan to world-renown institutions in the United States such as Harvard University and the University of Texas at Austin. Her research and contributions to educational psychology, has [*sic*] earned her the praise of colleagues and former professors.

. . . Labor certifications are designed to determine if there are U.S. workers with minimal qualifications to meet a job need. There is no claim that psychometricians must all be geniuses or Ivy League graduates, however if only “minimally qualified” workers were to fill this position to create these standardized tests, a prospective employer would be deprived of the services of the Beneficiary who can serve the national interest to a substantially greater degree.

It would be contrary to the national interest to potentially deprive a prospective employer of the services of the Beneficiary by making psychometric researchers a minimally qualified position via labor certification.

The intended meaning of the last quoted sentence is not clear. The labor certification process does not make any given position “a minimally qualified position.” Also, counsel did not explain why the petitioner “can serve the national interest to a substantially greater degree” than a qualified United States worker. (The labor certification process does not require the hiring of underqualified or unqualified workers; such workers, by definition, are not minimally qualified.) The petitioner’s educational background does not presumptively qualify her for the waiver, any more than degrees from more obscure schools would disqualify an alien seeking the waiver. The assertions that the petitioner is “respected” and has “earned . . . praise” are too vague to be of use.

On her *curriculum vitae*, the petitioner claimed experience as a teacher and as a writer of lesson plans, but she claimed no prior experience designing standardized tests and did not list “psychometrician” among her prior occupations. Most of her claimed experience involved teaching English and interpreting for speakers of Mandarin Chinese. Similarly, the discussion of the petitioner’s “research interests” included “General learning strategies,” “Second language acquisition” and “Shyness,” but no mention of psychometrics (although she did acknowledge having taken coursework in psychometrics). Considering that the use of psychometrics to design standardized tests is a centerpiece of counsel’s

initial arguments, this is a significant omission. Counsel failed to explain how the petitioner's background distinguishes her from "minimally qualified" psychometricians, apart from appealing to the reputations of the universities where she studied.

The petitioner submitted five witness letters. Four of the five witnesses were involved in the petitioner's graduate studies at the University of Texas at Austin (UTA). None of these four witnesses discussed the petitioner's work in psychometrics in any detail; instead, they focused on other aspects of the petitioner's studies or praised her specific aptitudes. [REDACTED] stated:

I have known [the petitioner] for three years as her instructor in several graduate classes and as a member of her dissertation committee at the University of Texas at Austin. We have also had a number of long discussions over the years about language learning and teaching. I believe that [the petitioner] is an "up and comer" in second language acquisition research. She brings a unique set of skills to our understanding of second language learning and teaching. Specifically, she combined a doctoral program in Educational Psychology with a concentration in teaching English as a Second Language. Accordingly, her competence in statistical approaches to second language acquisition research is considerably stronger than that of most scholars in the field. . . .

In her dissertation, [the petitioner] studied the use of language learning strategies and personality type in successful language learning. To my knowledge, she is the first scholar to explore the role of shyness in language learning. I believe that her research offers important insights to help us understand why some immigrants spend many years studying English but are still unable to participate competently in conversations with other English-speakers.

[REDACTED] praised the petitioner's "remarkable ability to learn and to adapt to the demands of an intensive research experience" and her "particularly strong background in quantitative data analysis." Like [REDACTED] [REDACTED] focused her comments on the petitioner's studies of how shyness affects second language acquisition. [REDACTED] also stated that the petitioner "is a capable and experienced simultaneous interpreter."

[REDACTED] stated that the petitioner has contributed to the work of his research group, whose

work is directed at the emotion of boredom and it's [sic] relation to motivation.

Her ideas for her prospectus work were good ones, well worked out, and her prospectus process went well. Now she has also completed work on a really good dissertation project and defended that dissertation at her first oral. In both her prospectus and her dissertation she was concerned with integrating ideas from personality theory, on the one hand, with ideas from the mainstream learning and motivation literatures on the other hand. I believe that what she has done now provides a foundation for a program of

research that, over many studies, could have interesting implications for how teachers might think about customizing instructional techniques to fit the personalities [sic] of individual students.

. . . I believe that her potential to contribute to the educational system in the United States compares favorably to anyone of any nation of origin.

[REDACTED] a senior researcher with the Texas Higher Education Coordinating Board, is not on the UTA faculty, but served on the petitioner's doctoral dissertation committee. [REDACTED] stated:

[The petitioner] offers a unique blend of qualities:

First, [the petitioner's] knowledge and application of the nature of her research is so important to helping the United States increase participation and success of students in Higher Education. The more understanding we have of how students learn or, more importantly, do not learn, in the college classroom, the better we can serve them. This includes shy students who may go unnoticed by their professors or peers. Her research can help us reach these students. . . .

Second, [the petitioner's] content knowledge and command of research methods/statistics would be valuable in other sectors of the U.S. labor market. The transferability of her skills to other sectors would be a tremendous benefit to the U.S., especially the business sector. [The petitioner] has the extraordinary quality of being able to help companies navigate the cultural landscape of Asian cultures and to design/evaluate the effect of related training programs and interventions. Her deep knowledge of human learning and her research into shyness would be a boon for any company that hired her.

The only witness not involved in the petitioner's graduate studies at UTA has older ties to the petitioner. [REDACTED] of Reading Test Development at Data Recognition Corporation, Maple Grove, Minnesota, stated:

I met [the petitioner] as a graduate student at Harvard University in 1996. . . .

Her Doctor of Philosophy degree allows [the petitioner] to pursue one of two paths – that of her current research or that of educational testing and psychometrics to which I can speak.

The educational testing business is very specialized. . . . I can say there are not enough psychometricians in this line of work. . . .

Psychometricians are needed in school districts to help run testing programs and monitor test scores for individual schools, at the state level in departments of education, in

colleges and universities to carry out educationally related research in the testing arena, and in companies that provide testing services to state departments of education such as the company for which I work. . . .

A major factor that distinguishes [the petitioner] from . . . other colleagues in various countries is her English language skills.

A shortage of qualified workers is not a strong basis for the waiver, because the labor certification process already exists to address local worker shortages. *See Matter of New York State Dept. of Transportation* at 218. [REDACTED] does not claim that the petitioner's fluency in the English language distinguishes her from United States workers in the same field. Instead, [REDACTED] artificially limits consideration to alien psychometricians from non-English speaking countries.

None of the initial witnesses claimed that the petitioner's work had already had any significant impact on her field of endeavor. Rather, the witnesses stated that her student work showed great potential for future contributions. Furthermore, most witnesses discussed the petitioner's research on language acquisition; the only witness to even mention psychometrics acknowledged that the petitioner's "current research" lies elsewhere. Counsel, however, concentrated almost exclusively on psychometrics combined with general assertions about education policy. Counsel, therefore, ignored the bulk of the petitioner's work and staked the waiver application on a career path that the petitioner has, thus far, not followed. In essence, counsel asserted that the petitioner should receive the waiver because the option of pursuing employment in educational testing and psychometrics is open to her.

The remainder of the petitioner's initial submission consists of general background information about education and psychometrics rather than evidence relating specifically to the petitioner. Neither counsel nor any witness discussed how the petitioner's employment as a market research analyst served the national interest, or related to educational psychology in general or psychometrics in particular.

On April 20, 2009, the director instructed the petitioner to submit evidence to show "the full extent to which the beneficiary's research findings have been implemented by others throughout this research field." The petitioner's response, which contains no evident mention of psychometrics at all, consisted of two more witness letters. [REDACTED] of the University of Maryland stated:

I do not know [the petitioner] personally. However, I have met her at conferences that we were both attending and on a recent visit to the University of Texas where I was giving an invited address. . . .

What I see in her research is a serious attempt at understanding how learners are affected by their motivational approaches, their emotions, and the strategies they use in learning a foreign language. Her focus on the construct of shyness shows an insight into how students of different temperaments may respond to a classroom situation that requires verbal interaction. I believe the study represented by her dissertation research is publishable. . . .

In my estimation, there are several qualities that [the petitioner] would bring to the discipline that are not easily replicated by her peers in the field. Not only is she trained as an educational psychologist but she also has cultural and language knowledge that allow her an unusually broad level of empathy and skill in interacting with students and scholars from an increasingly diverse population in our American universities. I can see her future presence at international meetings and in research groups as an asset to the discipline.

[redacted] of the University of Texas at San Antonio stated:

My research projects have included topics related to students' emotion regulation in academic settings, teachers and their understanding of emotional transactions in the classroom, and a variety of research methods used to study emotions. I have met [the petitioner] when I traveled to the University of Texas at Austin for an invited talk a few years ago when she was still a doctoral student and have been acquainted with her from meetings at conferences. Her lines of research on academic boredom and shyness among Taiwanese college students learning English as a foreign language drew my attention. Both topics can help teachers demystify the emotions their students are experiencing while learning and further modify their delivery of course materials and activities they utilize. Specifically, [the petitioner's] personal experience and understanding of how shyness is perceived in the Chinese culture should prove valuable, especially in enriching the understanding of American teachers who may misinterpret the quiet nature of these seemingly shy students. . . .

In addition to [the petitioner's] research endeavors, her past college teaching experience both in Taiwan and at the University of Texas at Austin has prepared her to be a well-rounded scholar who has the capacity of interacting productively and effectively with ethnically diverse colleagues and students.

Like the initial witnesses, the witnesses quoted above attested not to the petitioner's impact on her field, but rather to her potential for eventually having such an impact.

The director denied the petition on August 18, 2009. In the decision, the director found that the petitioner had not shown the impact, influence or significance of her work, compared with that of other qualified workers in her field. On appeal, counsel states that the petitioner "is a professional educational psychologist whose work, education, and experience are primarily focused in the areas of education, psychology, with a prospective future in the area of psychometrics." The record contains no evidence that the petitioner "is a professional educational psychologist." The record shows that she has training in that specialty, but it also indicates that she was employed as a market research analyst when she filed the petition. There is no evidence that the petitioner has ever been a practicing educational psychologist. Speculation about the petitioner's "prospective future in the area of psychometrics" has no weight as evidence. The unsupported assertions of counsel do not

constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The one witness who actually mentioned psychometrics acknowledged that the petitioner was not yet engaged in psychometrics, and would have to abandon “her current research” in order to move into that field.

Counsel contends that the director “created a new standard in which the person recommending the applicant must be a third party who is unfamiliar with the Applicant’s work but be able to write a detailed recommendation. NYSDOT makes no mention of such.” The director did not request letters from witnesses “unfamiliar with [the petitioner’s] work.” Quite the contrary; the point of the request was to establish the impact of the petitioner’s work outside of her circle of mentors and collaborators. While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. *Matter of New York State Dept. of Transportation* at 219.

The petitioner need not be among the most prominent individuals in her chosen specialty, but if her work is virtually unknown except to her professors, then it is difficult to infer that she has built up a significant record of achievement. The witnesses of record discussed previously have not claimed that the petitioner has influenced her field (whether that field is educational psychology or psychometrics). Rather, they have referred to her “potential,” or to her “promising” career.

The petitioner submits two new witness letters on appeal. Like a number of other witnesses, [REDACTED] assistant professor at Oklahoma State University, met the petitioner at a professional conference. [REDACTED] states that the petitioner’s “project about graduate students’ use of politeness strategies in online discussion . . . has attracted much attention from scholars in the fields of technology, education and literacy, and their findings have been published in several reputable journals.” The record contains no objective evidence of this “attention,” or even that the petitioner’s “findings have been published in several reputable journals.”

The appeal includes uncorrected proof copies of two articles identified as “in press.” These articles did not exist when the petitioner filed the petition, and they remained unpublished when the petitioner filed the appeal nearly a year later. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The title of one article refers to “Being polite,” but a proof copy of one unpublished article does not establish that the petitioner’s work in this area had previously already “been published in several reputable journals.”

[REDACTED] principal research scientist at the Educational Testing Service, Princeton, New Jersey, is the first independent witness to be directly involved in standardized testing of students. [REDACTED] (who, like other witnesses, met the petitioner at a conference) states that the petitioner’s “program of research on academic boredom and shyness among Taiwanese college students . . . has garnished [*sic*] my interest. . . . [The petitioner’s] research provides some stimulating ideas that may be

followed up in subsequent studies; the hallmark of a successful scholar.” To qualify for the special benefit of a national interest waiver, one must be more than “a successful scholar.” One must empirically distinguish oneself from one’s peers, a process that involves more than locating witnesses willing to provide favorable letters. [REDACTED] states that the petitioner’s work is “gaining wider significance,” but he does not show that the petitioner was already an influential researcher when she filed the petition in 2008.

The petitioner has clearly obtained high-quality education in educational psychology, and her efforts have begun to bear fruit in the form of published articles and conference presentations. It may well be that, at some future time, her work will show demonstrable influence in the field of educational psychology in general or even psychometrics in particular. We cannot, however, find that the petitioner had such an impact as of the petition’s filing date. Her claimed employment as a market research analyst at [REDACTED] in 2008-2009 does not readily demonstrate demand for the petitioner’s services in the field of educational psychology, nor does it readily demonstrate any intention by the petitioner to work in that field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.